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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT TACOMA

9 BEVERLY J. KNODEL,

10 Plaintiff,

11 v.

12 PROVIDENCE HEALTH AND  
13 SERVICES, d/b/a PROVIDENCE  
14 SOUNDHOMECARE AND HOSPICE,

15 Defendant.

CASE NO. C10-5292BHS

ORDER GRANTING IN PART  
AND DENYING IN PART  
DEFENDANT'S MOTION  
FOR SUMMARY JUDGMENT  
AND DENYING PLAINTIFF'S  
MOTION TO STRIKE

16 This matter comes before the Court on Defendant's ("Providence") motion for  
17 summary judgment (Dkt. 20) and Plaintiff's ("Knodel") motion to strike certain  
18 testimony. The Court has considered the pleadings filed in support of and in opposition to  
19 the motion and the remainder of the file and hereby grants in part and denies in part  
20 Providence's motion for summary judgment and denies Knodel's motion to strike for the  
21 reasons provided herein.

22 **I. PROCEDURAL HISTORY**

23 On June 15, 2011, Providence moved for summary judgment on Knodel's claims.  
24 Dkt. 20. On July 5, 2011, Knodel responded in opposition to Providence's motion for  
25 summary judgment and moved therein to strike certain statements relied upon by  
26 Providence in supporting its summary judgment motion. Dkt. 27. On July 8, 2011,  
27 Providence replied.  
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## II. FACTUAL BACKGROUND

This is an employment case wherein Knodel alleges (1) age discrimination under the Employment Act, 29 U.S.C. § 623 and Washington Law Against Discrimination (“WLAD”), RCW 49.60, *et seq.*; (2) violation of the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.*, and WLAD; and (3) violation of the Family Medical Leave Act (“FMLA”), 29 U.S.C. § 2601, *et seq.* Complaint (Dkt. 1) ¶¶ 3.1-3.3.

Knodel is a registered nurse. Complaint ¶ 1. Knodel worked for Providence for nearly 40 years, and in May 2006 at age 62 began working for Providence’s hospice unit. *Id.* The hospice division provides end of life care. The average hospice employee is 50 years of age and the average nurse case manager is 53 years of age. Knodel was terminated at age 65 and alleges she was replaced by a person who is 50 years old. Dkt. 21 (Providence’s chart of undisputed facts) (citing Declaration of Cheryl Richards (Richards Decl.) ¶ 6). Providence employs more than 100 people but less than 500 people. Complaint ¶ 2.2; *see also* Richards Decl. ¶ 6 (Providence’s hospice unit employs 79 people, 23 of whom are case managers). It is undisputed that Providence is a religious based, non-profit organization providing health care. Providence is divided into two divisions: health and hospice. *See e.g.*, Richards Decl., Ex. A.

When Knodel began working as a case manager in the hospice unit her supervisor was Steve Williams. Deposition of Beverly Knodel (Knodel Dep) 69:14-16. In January 2009, the hospice unit hired Nancy Kelly (“Kelly”) as a clinical manager. Deposition of Nancy Kelly (“Kelly Dep.”) 5:12-20. When Kelly began, she was the only clinical manager and Knodel began reporting to Kelly. *See id.* In February 2009, Susan Botka (“Botka”) was hired as a second clinical manager. Declaration of Susan Botka (“Botka Dep.”) 6:15-19. Botka and Kelly divided the staff that previously only reported to Kelly. Kelly Dep. 7:21-8:4. In that division, Knodel started reporting to Botka. Botka Dep. 10:11-13.

1       Next, Rena Graves (“Graves”) was hired on as the third clinical manager, and she  
2 became Knodel’s direct supervisor. Knodel Dep. 70:13-15. Botka assisted Graves in  
3 getting up to speed on her direct reports, i.e., familiarizing them with her direct reports’  
4 employee files. Botka Dep. 10:1-3. Graves was Knodel’s direct supervisor at the time  
5 Knodel was terminated from employment with Providence. *See* Knodel Dep. 70:16-18.

6       Shortly after beginning work for the hospice unit, Knodel suffered a brain  
7 aneurysm and later was diagnosed and treated for breast cancer. *Id.* ¶ 2.3. In May of 2008,  
8 Knodel requested that her case load be limited due to fatigue, which was a result of her  
9 craniotomy for the ruptured aneurysm. *Id.* ¶ 2.4. In 2008, Knodel underwent surgery for  
10 breast cancer and, due to complications, Knodel had to wait until January of 2009 to start  
11 her chemotherapy treatment. *Id.* In February of 2009, Knodel requested an  
12 accommodation due to fatigue caused by the chemotherapy treatments and she requested  
13 intermittent FMLA leave for her health condition and associated fatigue. *Id.*

14       While Knodel received some time off after her brain aneurysm and then received  
15 some accommodations upon returning to work, she alleges that Providence denied some  
16 of her requests to use FMLA associated with her breast cancer treatment. *Compare, e.g.,*  
17 Knodel Dep. 147:171-148-14 with, *e.g.,* Complaint. ¶ 2.5; *but see* Knodel Dep 152:20-  
18 153:3, 160:20-22 (Knodel affirming that she received all FMLA leave requested and that  
19 she received every accommodation she asked for, except for one relating to doing patient  
20 charts in her work vehicle; Knodel admits that the hospice did not require charting in her  
21 vehicle but did require charting soon after seeing a patient, at home or in one’s vehicle).  
22 Knodel also alleges that beginning in May 2009, Knodel’s managers wrote her up for  
23 “issues that either were not violations of policy, misrepresented the facts or for which  
24 other employees were not reprimanded.” *Id.* ¶ 2.6. Knodel further alleges that on June 18,  
25 2009, she was informed that if she did not quit she would be fired; Knodel was terminated  
26 from employment with Providence on June 26, 2009. *Id.*

1 Providence contends that Knodel was terminated for valid reasons. Providence  
2 maintains that Knodel was ultimately terminated for failure to meet expectations in a  
3 certain patient's care. Specifically, Providence claims that Knodel failed to properly  
4 document the patient's care, failed to provide adequate pain management, and failed to  
5 inform Providence about the fact that the patient who had a bone-compromising cancer  
6 was seeing a chiropractor, which can be dangerous for such a patient. *See, e.g.*, Dkt. 21 ¶¶  
7 110-115. Botka and Graves assert that they decided Knodel's conduct was putting the  
8 hospice unit at risk and that she needed to be terminated as an employee. Additionally,  
9 Botka and Graves reported Knodel to the Washington State Nursing Commission (the  
10 "WSNC"); however, the WSNC did not pursue the matter. *See id.* ¶ 122.

### 11 **III. DISCUSSION**

#### 12 **A. Summary Judgment Standard**

13 Summary judgment is proper only if the pleadings, the discovery and disclosure  
14 materials on file, and any affidavits show that there is no genuine issue as to any material  
15 fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).  
16 The moving party is entitled to judgment as a matter of law when the nonmoving party  
17 fails to make a sufficient showing on an essential element of a claim in the case on which  
18 the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323  
19 (1986). There is no genuine issue of fact for trial where the record, taken as a whole,  
20 could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec.*  
21 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must  
22 present specific, significant probative evidence, not simply "some metaphysical doubt").  
23 *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if  
24 there is sufficient evidence supporting the claimed factual dispute, requiring a judge or  
25 jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477  
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1 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d  
2 626, 630 (9th Cir. 1987).

3 The determination of the existence of a material fact is often a close question. The  
4 Court must consider the substantive evidentiary burden that the nonmoving party must  
5 meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477  
6 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual  
7 issues of controversy in favor of the nonmoving party only when the facts specifically  
8 attested by that party contradict facts specifically attested by the moving party. The  
9 nonmoving party may not merely state that it will discredit the moving party’s evidence at  
10 trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec.*  
11 *Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory,  
12 nonspecific statements in affidavits are not sufficient, and missing facts will not be  
13 presumed. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888-89 (1990).

## 14 **B. Providence’s Summary Judgment Motion**

15 Providence moves for summary judgment as to each of Knodel’s claims. Dkt. 20.

### 16 **1. WLAD**

17 Because Providence and, more specifically, its hospice unit is a non-profit  
18 religious organization, it is expressly exempt from the provisions of WLAD. *Salina v.*  
19 *Providence Hospice of Seattle*, 226 Fed. Appx. 653 (9th Cir. 2007) (citing RCW  
20 49.60.040(4)); *see also* RCW 49.60.040(3) (WLAD applies to “employers” but does not  
21 include religious or sectarian non-profit organizations in its definition of “employer”); *see*  
22 *also Erdman v. Chapel Hill Presbyterian Church*, 156 Wn. App. 827, 848-50 (2010)  
23 (holding that WLAD does not apply to non-profit religious employers).

24 Alternatively, Plaintiff argues that Providence should be estopped from asserting  
25 that WLAD does not apply because, although it is a religious non-profit, its EEO policy  
26 provides that “[t]he Employer and the Union agree not to discriminate or condone  
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1 harrassment in any manner in conformance *with applicable* federal and state laws . . . .”  
2 Dkt. 27. However, this argument is unavailing because WLAD is not applicable, and  
3 Providence only agreed to conform with “applicable” laws. *See, e.g., Erdman*, 156 Wn.  
4 App. at 848-850. Therefore, Knodel’s estoppel argument fails because she cannot  
5 establish that she relied on something that, in fact, was not promised. *See, e.g., Corbit v.*  
6 *J.I. Case Co.*, 70 Wn. 2d 522, 539 (1967) (setting out elements for promissory estoppel).<sup>1</sup>

7 Therefore, the Court grants Providence’s motion for summary judgment on this  
8 issue.

## 9 **2. Disability Discrimination**

10 Knodel claims that she suffered an adverse employment action (termination) due to  
11 being discriminated against for being disabled under the Americans with Disabilities Act  
12 (“ADA”) and for seeking FMLA leave. In opposition, Providence argues that Knodel’s  
13 ADA claim must fail because she was either not disabled and/or not subjected to disparate  
14 treatment. Additionally, Providence contends that Knodel received all requested leave and  
15 accommodations under FMLA.

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17 The ADA prohibits an employer from discriminating “against a qualified  
18 individual with a disability because of the disability.” *Kennedy v. Applause, Inc.*, 90 F.3d  
19 1477, 1480 (9th Cir. 1996) (quoting 42 U.S.C. § 12112(a)). To establish a claim under the  
20 ADA, the plaintiff must show that he: (1) is a disabled person within the meaning of the  
21 ADA, (2) is qualified with or without a reasonable accommodation to perform the  
22 essential functions of the job, and (3) suffered an adverse employment action because of  
23 the disability. *Id.* at 1481. Once a plaintiff has established a prima facie case, the burden  
24 of persuasion then shifts to the defendant to articulate a legitimate, non-discriminatory  
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26 <sup>1</sup>The elements of promissory estoppel are “(1) a promise which (2) the promisor should  
27 reasonably expect to cause the promisee to change his position and (3) which does cause the  
28 promisee to change his position (4) justifiably relying upon the promise, in such a manner that  
(5) injustice can be avoided only by enforcement of the promise.”

1 reason for its adverse employment action. *Texas Dep't of Cmty. Affairs v. Burdine*, 450  
2 U.S. 248, 253 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). If  
3 the defendant provides such legitimate reasons, the burden of persuasion reverts to the  
4 plaintiff to provide evidence that the reason(s) given by the defendant are merely a pretext  
5 for discrimination. *Burdine*, 450 U.S. at 256. In the context of a motion for summary  
6 judgment, the plaintiff must raise a genuine issue of material fact that the defendant's  
7 legitimate, non-discriminatory reason for an adverse employment action was pretextual.  
8 *Snead v. Metro. Prop. & Cas. Co.*, 237 F.3d 1080, 1094 (9th Cir. 2001). Additionally,  
9 Under the FMLA, it is "unlawful for any employer to interfere with, restrain, or deny the  
10 exercise of or attempt to exercise any [FMLA rights]." 29 U.S.C. § 2615(a)(1). In order to  
11 survive summary judgment on her FMLA claims, Knodel must assert a genuine issue of  
12 material fact with respect to whether her FMLA leave constituted a negative factor in  
13 Providence's decision to terminate her. *Bachelder v. Am. West Airlines, Inc.*, 259 F.3d  
14 1112, 1122-25 (9th Cir. 2001).

16 The parties dispute whether Knodel was disabled under the ADA. The ADA  
17 provides that a disability, with respect to an individual, includes a physical or mental  
18 impairment that substantially limits one or more major life activities, such as working. 42  
19 U.S.C. § 12102. Providence argues that Knodel's only claimed disability is fatigue, which  
20 resulted from her aneurysm and breast cancer. Dkt. 20 at 12. Providence further argues  
21 that Knodel admitted that, during her employment with the hospice unit, she did not  
22 consider herself to be disabled. *Id.* (citing Knodel Dep. 163:21-24).

23 However, for purposes of summary judgment, the Court must reject Providence's  
24 interpretation of Knodel's relevant deposition testimony:

25 Q: So during the time that you worked at Hospice, did you – did you  
26 ever consider yourself to be disabled?

27 A: No. *Well, I guess, yes, I did.* But I don't really think I was so  
disabled that I couldn't make myself work.

28 Q: What disability did you consider yourself to have?

1           A:     Just the fatigue . . . .

2     Knodel Dep. 163:1-8 (emphasis added). Here, taking the facts in the light most favorable

3     to Knodel, she does express a belief that she was disabled. *See also* Deposition of Erin

4     Kershisnik, M.D. (“Kershisnik Dep., Dkt. 26, Ex. 1) at 5:24-10:16 (describing impact of

5     Knodel’s fatigue on her ability to work). Based on the foregoing and the remaining

6     record, Knodel has supplied competent evidence that raises a material question of fact as

7     to whether she was disabled under the meaning of the ADA, which satisfies the first

8     factor set out above. It is also arguable that Providence regarded Knodel as disabled given

9     that it filed a formal complaint to the WSNC claiming that Knodel “lacks mental capacity

10    to practice nursing.” Further, Providence issued a letter to the EEOC (Equal Employment

11    Opportunity Commission) in response to its request for a position statement on Knodel’s

12    allegations, stating in pertinent part that “[Knodel] was not discharged due to her age,

13    *disability* or in retaliation.” Dkt. 26-1 (emphasis added).

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15           As to the second element, there is no material dispute as to whether Knodel was

16    qualified and able to carry out her job functions with or without an accommodation.

17    Indeed, Knodel felt she could perform her job so long as she got enough rest and

18    Providence claims it terminated Knodel because she did not perform her job as expected.

19    Providence asserts that it terminated Knodel not because of her disability but simply

20    because she did not follow protocol and policies and that put the hospice unit at an

21    untenable risk. As such, Knodel satisfies the second element for purposes of summary

22    judgment.

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24           As to the third element, Knodel was terminated, which is an adverse employment

25    action. To tie this adverse employment action to her disability, Knodel points to the

26    response she received when requesting accommodation for her disability. Knodel does

27    not provide evidence of any particular request for leave or otherwise under FMLA that

28    was denied. Instead, she contends she was subjected to ridicule for making the requests



1 and that Botka, Kelly, Richards, and Catherine Koziar, director of the hospice unit, began  
2 creating a record of poor performance on the part of Knodel in order to fire her. *See, e.g.*,  
3 Declaration of Beverly J. Knodel (Knodel Decl.) ¶ 7. To support this contention, Knodel  
4 points to her file which contains records of all the warnings she received about her work  
5 performance that follow her FMLA leave requests. Knodel has also provided the Court  
6 with records of her good performance reviews that predate her claimed disability and no  
7 evidence exists in the record that she was failing to perform her duties before her  
8 disability began. *See id.* ¶ 13.

9         Knodel has also provided copies of email exchanges between the managers at the  
10 hospice unit that could be construed as a record created to justify her firing. *See, e.g.*, Dkt.  
11 26-1 at 27, Ex. 14 at 1 (email thread between Botka, Richards, and Graves that  
12 contemplates adding a suspension to a warning that would justify a later termination and  
13 “make [Knodel] realize [they] are serious, and give [Knodel] time to think about the  
14 resignation.”) This email could be interpreted by a jury to support Knodel’s contention  
15 that the performance evaluations were trumped up to set up Knodel’s discharge. This  
16 email also tends to corroborate Knodel’s claim that Richards told Knodel that “she should  
17 either quit or be fired.” Knodel Decl. ¶ 28. Additionally, there is at least some evidence  
18 that Kelly was indirectly hostile toward Knodel’s leave requests and that Koziar was  
19 directly hostile to Knodel regarding her FMLA requests. *See* Dkt. 21 at 87 (“And I  
20 remember [Koziar] coming to me and saying in front of God and everybody and a whole  
21 bunch of employer – employers – employees that – that [they] wouldn’t give you a lower  
22 patient load”).

24         Therefore, the facts, when taken in the light most favorable to Knodel, establish  
25 Knodel’s prima facie case of disability discrimination under the ADA.

26         Providence argues that, even if Knodel “could present a prima facie case of  
27 disability discrimination, the burden would shift to [it] ‘to produce evidence that the  
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1 employment action was based on legitimate, nondiscriminatory reasons.” Dkt. 20 at 13  
2 (collecting cases). Even assuming an impairment, real or perceived, the ADA does not  
3 immunize employees from terminations based on misconduct in the workplace. *Collings*  
4 *v. Longview Fibre Co.*, 63 F.3d 828, 831 (9th Cir. 1995).

5 Providence asserts that Knodel was fired because she failed to provide proper care  
6 to a patient and put that patient and Providence at risk in an unacceptable manner. This is  
7 a legitimate, nondiscriminatory reason for terminating Knodel. Having provided such a  
8 reason, the burden then shifts to Knodel to create a material issue of fact that  
9 Providence’s articulated explanation for discharge was a mere pretext for disability  
10 discrimination. See *Collings*, 63 F.3d at 833 (stating that, if a plaintiff cannot show that  
11 the defendant’s explanation for the discharge was a pretext for disability discrimination,  
12 then the plaintiff has not presented a triable issue under the ADA). Nonetheless, “the  
13 ADA does not require that a discriminatory impetus have been the only motive for an  
14 adverse employment action.” *Dark v. Curry County*, 451 F.3d 1078, 1084-85 (9th Cir.  
15 2006) (emphasis in original). “Rather, the ADA outlaws adverse employment actions  
16 motivated, even in part, by animus based on a plaintiff’s disability or request for an  
17 accommodation—a motivating factor standard.” *Id.* (internal quotation and citation  
18 omitted; emphases in original).

20 Here, Knodel has pointed to facts that could be believed to establish that  
21 Providence, specifically Knodel’s managers, trumped up a record of poor performance in  
22 an effort to support her termination and has corroborated her position by supplying,  
23 among other things, emails written by and between the managers that could suggest they  
24 were laying the groundwork to justify firing Knodel and avoid exposing that the  
25 discharge was based on an impermissible basis: Knodel’s claimed disability.

26 Therefore, based on the record before the Court, Knodel has met her burden to  
27 establish pretext and thereby defeat Providence’s motion for summary judgment. The  
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1 parties should not confuse this ruling for a statement on the strength of Knodel’s case.  
2 The Court is not suggesting that Knodel’s case is a strong one; rather, it is simply one in  
3 which a question of fact exists on this issue, and Knodel is entitled to defeat Defendants’  
4 summary judgment motion for that reason.

### 5           **3.     Age Discrimination**

6           Knodel asserts age discrimination under the Age Discrimination in Employment  
7 Act (“ADEA”). To succeed in such a claim, a plaintiff must establish that age was the  
8 “but for” cause of the challenged action. *Gross v. FBL Fin. Servs. Inc.*, \_\_ U.S. \_\_, 129 S.  
9 Ct. 2343, 2352 (2009). In *Gross*, the Court held that the text of the ADEA – which bars  
10 an employer from discriminating against any individual “because of such individual’s  
11 age,” 29 U.S.C. § 623(a)(1) – does not authorize a plaintiff to prevail if age was merely “a  
12 motivating factor” in the adverse employment decision. 129 S. Ct. at 2350. Relying on the  
13 definition of “because of” – which means “by reason of” – the Court concluded that age  
14 had to be “the ‘reason’ that the employer decided to act.” *Id.* However, it is noted that  
15 *Gross* did not reject the burden shifting analysis of *McDonnell Douglas*, which as  
16 discussed above requires a defendant to provide a legitimate nondiscriminatory reason for  
17 the challenged action and, if shown, the burden shifts back to a plaintiff to establish  
18 pretext.  
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20           Here, even assuming Knodel could establish a prima facie case of age  
21 discrimination, Knodel has not supplied sufficient competent evidence to establish that  
22 Providence’s reasoning for terminating her was merely a pretext for the claimed age  
23 discrimination. In fact, Knodel’s only direct evidence is that she, a 65-year-old employee,  
24 was replaced by a 51-year-old employee. While difference in age could be characterized  
25 as significant, Knodel supplies no other evidence of an ageist animus. Further, none of the  
26 circumstantial evidence in the record supports Knodel’s theory regarding age  
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1 discrimination.<sup>2</sup> The Court must, therefore, reject Knodel's claim that the same reasons  
2 justifying finding a pretext within the context of her disability claim justify finding  
3 pretext with respect to her age discrimination claim.

4 Based on the foregoing, the Court grants summary judgment in favor of  
5 Providence on this issue.

#### 6 **4. Retaliation Claim**

7 It is unclear whether Knodel has asserted a retaliation claim. Nonetheless,  
8 Providence argues that any such claim, though unclear, would fail. Dkt. 20 at 17. Knodel  
9 did not respond in opposition to this argument. Under Local Rule 7(d)(2), the Court may  
10 deem meritorious arguments for which a party does not file papers in opposition to a  
11 motion on summary judgment. Here, the Court is persuaded that Knodel has not  
12 supported such a claim with competent evidence, and Knodel has not filed any opposition  
13 to that argument.  
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15 Therefore, the Court finds Providence's argument on this issue to have merit and  
16 grants summary judgment on this issue.

#### 17 **C. Knodel's Motion to Strike**

18 Knodel moves to strike the statements made by a hospice patient's daughter about  
19 Knodel's ineffective provision of care as inadmissible hearsay. The Court denies this  
20 motion without prejudice; the Court did not rely on these statements in reaching its  
21 conclusion herein. Should this matter continue to trial, Knodel may renew the issue in a  
22 motion in limine.  
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26 <sup>2</sup>Even Knodel concedes that the direct evidence of age discrimination is weak and,  
27 following that, does not supply any circumstantial evidence other than conjecture to support her  
28 position on this issue. Such is insufficient to defeat Providence's summary judgment motion.

1 **IV. ORDER**

2 Therefore, it is hereby **ORDERED** that Providence's motion for summary  
3 judgment is **GRANTED in part** and **DENIED in part** as discussed herein. Knodel's  
4 motion to strike is **DENIED** as discussed herein.

5 DATED this 15th day of August, 2011.

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8 BENJAMIN H. SETTLE  
9 United States District Judge  
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